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IN THE
COURT OF APPEALS OF INDIANA

RICHARD A. ROLLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0604-CR-165
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0504-FD-104

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Richard A. Rolland appeals his conviction following a bench trial for theft, as a class D felony.[1]

We affirm.

ISSUES

1. Whether the photographic identification of Rolland was impermissibly suggestive.

2. Whether there is sufficient evidence to support the conviction.

FACTS

On April 7, 2005, Jason Hobbs was working as a loss-prevention supervisor in the menswear department of the J.C. Penney in Greenwood. On that day, J.C. Penney opened at 10:00 a.m. Prior to opening, Hobbs "made sure the fitting room was cleaned and clear." (Tr. 7).

At approximately 10:45 a.m., Hobbs noticed a man, later identified as Rolland, carrying two "beat up" and "worn" shopping bags. (Tr. 20). From "approximately thirty to forty feet" away, Hobbs observed Rolland "select approximately five pieces of athletic wear from what [he] believed to be Adidas and Nike wear." (Tr. 10, 7). Hobbs maintained surveillance of Rolland as he entered the men's fitting room. When Rolland exited the fitting room, he carried only one item, which he put back on the rack. When Hobbs entered the fitting room, he found that "the merchandise wasn't in the fitting rooms at all." (Tr. 11).

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[1] Ind. Code § 35-43-4-2(a).

Chris Downhour, a J.C. Penney loss-prevention officer, also observed Rolland walking around the menswear department. Downhour "was probably no more than twenty, thirty feet away [from Rolland] at all times." (Tr. 24). Downhour saw Rolland "pick[] up some Nike and Adidas, some pants and a jacket" and then "walk towards the fitting room." (Tr. 25). When Rolland came out of the fitting room, "he had like one pair of pants or one jacket," which he put back on the rack. (Tr. 25).

While Hobbs checked the fitting room, Downhour followed Rolland to an exit. Downhour radioed Hobbs "to let him know [Rolland] . . . was on his way out." (Tr. 27). Hobbs, however, had not finished checking the fitting room. By the time Hobbs had finished checking the fitting room, Rolland "was already in his vehicle . . . ." (Tr. 27). Hobbs contacted the Greenwood Police Department and filed a report.

On April 14, 2005, Detective Rex Saltsgaver of the Greenwood Police Department presented a photo array to Hobbs. Hobbs identified Rolland from the photo array as the man he had seen in J.C. Penney on April 7, 2005. Detective Saltsgaver showed the same photo array to Downhour on April 15, 2005, and Downhour also identified Rolland as the man he had observed on April 7, 2005.

On April 11, 2005, Laura Sue Garrett was working at the J.C. Penney in Plainfield. Rolland wanted to return "four articles of clothing," including "a Nike pant and jacket and an Adidas pant and jacket," and a visor. (Tr. 38, 41). Rolland had an "exchange receipt," obtained when "he had returned merchandise at another store," for which he "didn't have a receipt," and "bought merchandise on that same transaction" with the credit received from the return. (Tr. 35). The receipt was from an exchange

made at a J.C. Penney in Lafayette "[a] couple hours earlier" that same day. (Tr. 38). According to the receipt, Rolland had "returned and purchased the exact same items." (Tr. 41). After checking Rolland's identification, which was the procedure when a customer returned merchandise for cash, Garrett issued Rolland a refund in the amount of approximately $130.00.

On April 26, 2005, the State charged Rolland with theft, as a class D felony. The trial court held a bench trial on March 27, 2006 and found Rolland guilty as charged.

DECISION

1. Photo Array

Rolland asserts that the photo array admitted into evidence at trial was impermissibly suggestive, and therefore, violated his right to due process. Specifically, Rolland argues the photo array was impermissibly suggestive because Hobbs and Downhour "described [Rolland] to [Detective Saltsgaver] as being five feet nine or ten with red hair and a red goatee," and the photo array "consist[ed] of five men with brown or black hair and one man with red hair and a red goatee . . . ." Rolland's Br. 7.

"The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive." *Williams v. State*, 774 N.E.2d 889, 890 (Ind. 2002). "A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances." *Id.* "'Our supreme court has held that a photo array is impermissibly suggestive only where the array is accompanied by verbal communications or the photographs in the display include graphic

characteristics that distinguish and emphasize the defendant's photograph in an unusually suggestive manner.'" *Dillard v. State*, 827 N.E.2d 570, 573 (Ind. Ct. App. 2005) (quoting *Allen v. State*, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004), *trans. denied*), *trans. denied*. Law enforcement officers, however, "are not required to 'perform the improbable if not impossible task of finding four or five other people who are virtual twins to the defendant' when compiling a photo array." *Id.* (quoting *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003)).

In this case, Hobbs described Rolland as having "a lighter shade" of "red hair with a red goatee." (Tr. 20, 7). Detective Saltsgaver showed Hobbs and Downhour a photo array of six individual photographs. All of the men in the photo array were Caucasian and had facial hair, five of them with goatees. All of the men had short hair, ranging in color, with Rolland having the lightest hair color. All of the men were photographed head-on and in front of substantially similar backgrounds. Considering the totality of the circumstances, the photographic array was not impermissibly suggestive.

2. Sufficiency of the Evidence

Rolland asserts the evidence is insufficient to sustain his conviction. Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of witnesses. *Snyder v. State*, 655 N.E.2d 1238, 1240 (Ind. Ct. App. 1995). We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom, and, if there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id*. "[A]

theft conviction may be sustained by circumstantial evidence." *Hayworth v. State*, 798 N.E.2d 503, 507 (Ind. Ct. App. 2003).

The State charged Rolland with theft under Indiana Code section 35-43-4-2(a), which provides that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony." To "'exert control over property' means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property." I.C. § 35-43-4-1(a).

In this case, Hobbs and Downhour saw Rolland take two shopping bags and several items of clothing into a fitting room. Hobbs and Downhour observed Rolland exit the fitting room with only one item of clothing. Subsequently, Hobbs searched the fitting room and did not find any of the other items of clothing taken in there by Rolland. Rolland then left the store. Rolland later exchanged articles of clothing similar to those he had taken into the fitting room. From these facts, the trial court could have reasonably inferred that Rolland committed theft. The evidence is sufficient to support Rolland's conviction.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.